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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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The issues presented in the Petition for Certiorari do not arise on the record below. As is readily apparent from the unique facts of this case, the decision of the Seventh Circuit is fully supported by the record, is in step with the decisions of this Court, and is in fact mandated by Title VII.

STATEMENT OF THE CASE.

Petitioner Furnco asks this Court to reconsider a decision of the Seventh Circuit which held that Petitioner's practice of hiring bricklayers from a list that contained the names and telephone numbers of white bricklayers only in preference to

during the relevant time period were filled with bricklayers from Dacies' list.[3] In other words, 90 percent of the jobs were for whites only, and as to these positions, there was no way for a black bricklayer to get in line for consideration regardless of his qualifications or experience.

The panel correctly found that Furnco's practice violates both Title VII and Section 1981. Title VII guarantees every man the right of equal access to employment. However, the indisputable consequence of defendant's employment practice is that black bricklayers do not have equal access to employment with Furnco. Black bricklayers have no access to Dacies' list, and black bricklayers have no access to jobs filled from that list. There is no conceivable business justification for using an all-white list, particularly since there are substantial numbers of black bricklayers in the industry and the superintendent had worked with many of these black bricklayers.

REASONS FOR DENYING THE WRIT.

The Seventh Circuit's actual rulings adverse to Petitioner were soundly decided and are fully consistent with the decisions of other Courts of Appeal and of this Court as well. Furthermore, the appellate decision was carefully drafted to resolve the unique legal issue posed by the facts of this case and was expressly limited in this regard. Under these circumstances, the Petition should be denied.

3. The relevant time frame for analyzing Furnco's hiring on this job is August 25 to September 30, 1971 for the reasons that by September 30, negotiations to settle a pending lawsuit and to avoid this lawsuit had come to an end, EEOC charges had been filed, and Furnco knew that a lawsuit would be filed when the Title VII time limits expired.

I.

THE DECISION OF THE SEVENTH CIRCUIT SQUARES WITH ALL OF THE CASE LAW OF THIS COURT.

A. The Seventh Circuit's Rejection of Petitioner Furnco's Statistics Does Not Conflict with Hazelwood.

Contrary to Petitioner's assertions, nowhere does the Seventh Circuit suggest that the use of statistics in an employment discrimination lawsuit is a one-way street. Indeed, this is not a statistical case in the typical sense. To the contrary, the focus of the case was on the primary hiring practice of a large contractor that automatically and completely excluded blacks. As we said earlier, Petitioner delegated all of its hiring decisions to a white superintendent who then filled the job by calling experienced bricklayers who had previously worked for him and whose names he kept on a list for this purpose. Despite the fact that this superintendent worked with black bricklayers who were experienced and qualified, he never added their names to his list. Thus, to the extent that jobs were filled off the superintendent's list, they were open to white bricklayers only. And this is so because of the obviously discriminatory manner in which the white superintendent maintained his list.

All the Seventh Circuit said was that the maintenance of an all-white list for hiring purposes in an industry in which blacks have worked for twenty years is neither legitimate nor nondiscriminatory and the maintenance of that list becomes no less of an exclusionary devise because, long after plaintiffs applied for work, some blacks are transferred in. The logic of that holding is obvious. Blacks have a right to be fairly considered for every job they seek, not some limited percentage of jobs which the employer sets aside for them. If the first eight men who sought employment with Furnco and who met an honestly established standard were black, then the first eight men hired

should have been black. Title VII guarantees each plaintiff in this lawsuit equal access to each and every job that becomes available. And any practice that excludes them from a job violates that act.

Thus, there is no conflict with this Court's decision in *Hazelwood*.

B. Nor Does the Decision of the Seventh Circuit Conflict with the Teamster Decision.

Petitioner's second contention that there is an absence of intent to discriminate as required in *International Brotherhood of Teamsters* v. *U. S.*, ... U. S. ....., 97 S. Ct. 1843 (1977) because its practice of not hiring at the gate applied equally to blacks and whites misses the entire thrust of the Seventh Circuit's decision and misconstrues this Court's decision in *Teamsters*. First, it was not the company's refusal to hire at the gate that constituted the disparate treatment between white and black bricklayers, but rather the filling of 90 percent of the jobs at this site by calling bricklayers whose names appeared on the superintendent's white-only list.

Second, to the extent that a discriminatory motive must be found in cases such as this, this Court in *Teamsters* made it absolutely clear that a discriminatory motive can "be inferred from the mere fact of differences in treatment". *Teamsters, supra*, 97 S. Ct. at 1854 n. 15. It is difficult to imagine a clearer case of "differences in treatment" of whites and blacks. Petitioner[4] turned hiring over exclusively to a white superintendent, who has worked with white and black bricklayers who are experienced and qualified. The superintendent kept a list of men he had worked with in the past who he could call when he ran a job. However, this superintendent never added the name of a black bricklayer to his list. Consequently, each position filled by this superintendent at the Interlake job went to a white man, indeed every position ever filled by Mr. Dacies has gone to a white. There was no way for a black bricklayer to present his qualifications let alone be hired for any position filled off Dacies' list. The exclusion of blacks from jobs filled off this list was absolute. Nothing more is required under *Teamsters*.

4. Furnco has argued throughout this lawsuit that it needs "highly competent and experienced firebricklayers" because there is a high risk of personal injury if the work is not done properly and that hiring from a list of applicants would not assure this result. This is something of an overstatement. No evidence was offered to support a risk of personal injury. Furnco offered one witness who testified that there was once an explosion, the cause of which was unknown. And plaintiffs have worked on numerous furnaces without problems. Furthermore, there is no apprenticeship training in fire-

(Footnote continued on next page.)

II.

THE SEVENTH CIRCUIT PROPERLY WEIGHED AND THEN REJECTED THE TRIAL COURT'S FINDINGS AND CONCLUSIONS CONCERNING THE LEGITIMACY OF PETITIONER'S HIRING PRACTICES.

Here again, Petitioner's challenge to the Seventh Circuit's review is misdirected. The facts concerning the central issue of the legitimacy of Petitioner's hiring practices were undisputed. The fact that the superintendent had unfettered discretion of who to put on his list is undisputed.[5] The fact that this list

(Footnote continued from preceding page.)

brick work. Every firebricklayer, white and black, must learn the necessary skills on the job. Indeed, less than two years before the job in question, Furnco ran a job at the U. S. Steel's Southworks plant and hired journeyman bricklayers with no prior firebrick experience. Also, Furnco's President testified that the company's practice does not ensure them the most competent bricklayers or even that the bricklayers they hire are more competent than plaintiffs. More importantly, plaintiffs do not advocate a lowering of standards. They seek only the imposition of an employment practice that gives them equal access to jobs.

5. Nowhere does the Seventh Circuit equate subjective hiring standards with discrimination. Instead, the Seventh Circuit adds the superintendent's subjective standards with the superintendent's all-white list and concludes that the combination equals discrimination in the creation and use of that list.

was all-white despite the fact that he had worked with qualified black bricklayers before was undisputed.

Petitioner argues now, as it did below, that their hiring practice was both legitimate and necessary because there was no alternative procedure or that plaintiffs failed to identify an alternative which would have had a lesser racial impact. Thus, Petitioner argues that there was no basis for rejecting the findings of the District Court. There are three simple answers to Petitioner's assertion. First, there is no justification for hiring from an all-white list. Second, the overwhelming evidence in this record is that there was an obvious alternative. It was undisputed that black bricklayers only get employment by applying at various job sites by leaving their names and phone numbers with the bricklayer superintendent. Surely it takes little imagination to expand this application process in order for Furnco to get whatever additional information it deems necessary. Applications are commonly relied upon by businesses and by unions for identifying qualified persons.

Third, Furnco's argument that it cannot accept applications is, to say the least, disingenuous. We say this for the following reasons: Less than two years after this lawsuit was filed, Furnco ran a firebrick job at Inland Steel Corporation. When the company could not meet its manpower needs through its normal practice, it recruited an all-white crew of bricklayers from Canada. The company was then sued by some of the plaintiffs in this suit, together with other black bricklayers who had either worked for or attempted to work for Furnco in the past, but were not called for the Inland job. And in the Seventh Circuit, Furnco asked that the District Court's dismissal be affirmed on the sole ground that the black bricklayers had not gone to the job site gate and *applied* for employment.[6] Under these circumstances, there is ample support for the unanimous decision of the Seventh Circuit to reject Petitioner's position.

On this record, no issue appropriate for certiorari is presented.

6. *Pearson, et al.* v. *Furnco, et al., supra.*

CONCLUSION.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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